

Supreme Court, U. S.

FILED

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# Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 75 - 717.

HIRAM RICKER & SONS,  
PLAINTIFF-APPELLEE,

v.

STUDENTS INTERNATIONAL  
MEDITATION SOCIETY,  
DEFENDANT-APPELLANT.

ON APPEAL FROM THE SUPREME JUDICIAL COURT  
OF THE STATE OF MAINE.

**Brief in Opposition to Appellee's Motion to Dismiss.**

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**Table of Contents.**

I. Ricker does not support its lead argument that the constitutional question was not raised below	1
II. The Cohen rule is not applicable — the motion to amend was not collateral	2
III. The federal question is substantial	4

**Table of Authorities Cited.**

**CASES.**

Cohen, Executrix v. Beneficial Industrial Loan Corp., 337 US. 541, 69 S. Ct. 1221, 93 L. Ed. 2d 1528 (1949)	3
In Re Richards, 223 A. 2d 827 (Me. 1966)	3

**MISCELLANEOUS.**

McKusick "Certification: a procedure for cooperation between state and federal courts"	
16 Me. L. Rev. 33 (1964)	2
Maine Civil Practice Manual	4
Maine Rule 76B	3
9 Moore Federal Practice par. 110:10 (2d ed.)	3
United States Supreme Court	
Rule 29(3)	4
Wright, 22 Me. L. Rev. 511, book review of	
Maine Civil Practice	4

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### I. RICKER DOES NOT SUPPORT ITS LEAD ARGUMENT THAT THE CONSTITUTIONAL QUESTION WAS NOT RAISED BELOW.

Ricker's lead argument at pages 10-11 of its motion is an unsubstantiated assertion that the Society's federal claim was never raised before the Maine court. The body of the first argument concedes, however, that the federal claim was in fact raised before the Maine court by a formal, written motion to dismiss which set forth as its basis that: "the censoring of the Appellant's brief and argument is a prejudicial violation of fundamental due process

of law." Equally invalid is the statement at the conclusion of the lead argument at page 11 that "of course the Maine Court made no decision on that unraised issue." On the contrary, the Maine court entered a formal order on February 27, 1975, signed by the chief justice of the Maine court:

"Now, THEREFORE, It Is HEREBY ORDERED that the Defendant Appellant's motion for a stay is dismissed for mootness and its *motion for dismissal of the certification in its entirety is denied.*" Jurisdictional Statement, Appendix E, p. 47.

Thus, while Ricker boldly proclaims an argument that the Society's federal claim was never raised in the Maine court, no such argument is actually developed and Ricker even concedes that the federal claim was raised by formal motion in writing.

## II. THE COHEN RULE IS NOT APPLICABLE—THE MOTION TO AMEND WAS NOT COLLATERAL.

Ricker's second argument refers to the Society's effort to obtain a fair hearing of its argument in the Maine court, by moving to amend the certification in the Federal District Court. Ricker does not point out, however, that the motion to amend was made *after* the Maine court's order refusing to permit the Society to file the record and actually censoring (tearing out of the brief) numerous pages of the Society's argument. This unprecedented action by the Maine court is contrary to the policy objectives of certification procedure that ". . . the parties . . . would have all the protections that go with a fully adversary proceeding involving a concrete set of facts," 16 Me. L. Rev. 33, 41 (1964), McKusick, "Certification: A Procedure for cooperation between State and

*Federal Courts.*" The Maine Civil Practice Manual sets forth an example of a proper certification under Maine Rule 76B and refers to the "usual" practice of including the entire federal record with the certification. Moreover, in one of the earliest Maine certification cases, the Maine Supreme Judicial Court expressly stated that the fact abstract in the certification is not intended to provide a "definitive statement of the facts." *In Re Richards*, 223 A. 2d 827 (Me. 1966). Censorship of substantive argument is, of course, an act of prejudgment and entirely contrary to jurisprudence by adversary process.

After the Maine court censored the Society's brief, the Society brought a motion in the Federal District Court to amend the certification document by referencing the fact record. There, Ricker argued that the Maine court had already decided whether the fact record could be annexed and that the federal judge should not disturb or overrule the order of the Maine court. The federal judge denied the motion to amend.

Ricker argues that the denial of the motion to amend, although clearly not appealable under the Federal Rules of Civil Procedure, was appealable under the *Cohen* rule (*Cohen, Executrix v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S. Ct. 1221, 93 L. Ed. 2d 1528 (1949)). *Cohen*, however, applies only to orders which have a final effect on an aspect of the proceedings. For example, appeal is proper under *Cohen* of an order approving a stipulation dismissing an appeal; an order denying a motion to proceed in forma pauperis in the District Court; an order awarding counsel fees and the like. See 9 Moore, Federal Practice par. 110:10, at 135 (2d ed.). The denial of the motion to amend the certification in the instant case is not collateral, as are *Cohen* rule appeals;

rather the motion to amend is directly related to the principal action. Therefore, the *Cohen* rule has no application to the denial of the Society's motion to amend in the Federal District Court. The Society's first opportunity to appeal the astonishing action of the Maine court is the instant appeal.

### III. THE FEDERAL QUESTION IS SUBSTANTIAL.

Ricker's final argument is that the appeal raises no substantial federal question. On the contrary, however, the question raised in the instant appeal has been the source of extensive discussion by legal scholars and is indeed a subject of concern to the American Law Institute Study of the Division of Jurisdiction between State and Federal Courts. See Wright, book review of *Maine Civil Practice*, 22 Me. L. Rev. 511, 513. Professor Wright has criticized the Maine certification procedure because in his words, it brings cases before the Maine court which are "divorced from the complete factual setting in which they may be more carefully understood." The Maine certification procedure is also contrary to the certification rules of the United States Supreme Court which provide in Rule 29(3) that: "*Any portion of the record to which the parties wish to direct the court's particular attention* shall be printed in a single appendix prepared by the appellant or plaintiff in the court below" (emphasis added). Moreover, the act of censorship by a court is indeed a substantial matter, the circumstances of which are appropriate for the scrutiny of this Court.

Ricker argues that the record became a "dead" record when the First Circuit United States Court of Appeals reversed the judgment of the Federal District Court. The record, however, is neither "dead" nor "live" for that

matter, it is merely a compilation of factual information collected pursuant to the rules of evidence under the administration of a court of record. It is rather the *judgment* which is reversed, while the record is *remanded* and is fully available for subsequent use in further proceedings. Indeed, if this case is retried, both parties will probably want to read extensive portions of the transcript at the retrial. Ricker would not want to be bound by its assertion here that all of the exhibits and testimony presented at the first trial are "dead" and nullified.

Ricker argues that the factual matter sought to be introduced before the Maine court was "controverted" matter. In fact, the censored factual data at the root of this appeal was entirely uncontroverted. If the data were indeed contradicted, then Ricker could have countered the Society's argument simply by pointing to a few of the contradictory facts if any actually existed. Argument not grounded in established facts is not persuasive. Ricker's sole purpose in obtaining the censorship of the Society's argument and the record was to suppress the truth of the extent of its illegal performance as established by the independent testimony and exhibits of an inspector of the Maine department of health who testified in favor of the Society's position at the trial.

In summary, Ricker's motion to dismiss should be denied. First, the Society clearly raised its federal claim by a timely, formal, written motion to dismiss. Jurisdictional Statement, Appendix D, p. 43. Second, the denial of the Society's motion to amend the certification was not appealable under any rule of federal procedure, and the *Cohen* rule is clearly inapplicable since the subject of the motion to amend is at the crux of the principal action.

Third, the issue of the effect of the fact abstract controlled by the court instead of the adversaries is a matter of great critical concern in the administration of federal justice. This unresolved question has not escaped the critical attention of legal scholars. Moreover, the act of censorship and refusal to hear the Society's argument merits review by this Court.

Respectfully submitted,

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